Supreme Court
FILED
NOV 12 1994
OFFICE OF THE CLERK

No. 94-644

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HERCULES INCORPORATED,

Petitioner,

v.

UTAH STATE TAX COMMISSION
AUDITING DIVISION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

Brian L. Tarbet*
Assistant Attorney General
***Counsel of Record**
Jan Graham
Utah Attorney General
50 South Main, Suite 900
Salt Lake City, UT 84144
(801) 536-8200
Counsel for Respondent

No. 94-644

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

HERCULES INCORPORATED,

Petitioner,

v.

UTAH STATE TAX COMMISSION
AUDITING DIVISION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UTAH SUPREME COURT

BRIEF OF RESPONDENT IN OPPOSITION

Brian L. Tarbet*
Assistant Attorney General
*Counsel of Record
Jan Graham
Utah Attorney General
50 South Main, Suite 900
Salt Lake City, UT 84144
(801) 536-8200
Counsel for Respondent

QUESTION PRESENTED

Does inclusion of Utah consummated sales of motors and components in the Utah sales numerator of the three-factor formula under Utah's version of the Uniform Division of Income for Tax Purposes Act constitute impermissible double taxation where the taxpayer had filed and paid taxes previously to other states?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

JURISDICTION 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

A. FACTUAL SUPPLEMENT 1
B. UTAH'S APPLICATION OF UDITPA 3
C. DISPUTED FACTS 5
1. UDITPA 5
2. LOWER COURT PROCEEDINGS . . . 7

REASONS FOR DENYING THE WRIT 9

A. HERCULES HAS NOT MET ITS BURDEN TO ESTABLISH A COMMERCE CLAUSE VIOLATION 11

1. FAIR APPORTIONMENT 11
2. FAILURE TO SHOW DISCRIMINATION 15

B. THE FACTUAL RECORD UPON WHICH THE UTAH SUPREME COURT MADE ITS STATE LAW DETERMINATION DOES NOT SUPPORT HERCULES' CONSTITUTIONAL CLAIM 18

C. THE PUBLIC POLICY AGAINST TAX FORUM SHOPPING SUPPORTS

RESPONDENT'S POSITION 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Amerada Hess v. New Jersey,
490 U.S. 66 (1989) 6
Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 11
Container Corp. of Am. v.
Franchise Tax Bd.,
463 U.S. 159 (1983) 5, 10, 11
12, 14
Department of Revenue v.
Parker Banana Co.,
391 So. 2d 762
(Fla. Dist. Ct. App. 1980) 10
Exxon Corp. v.
Wisconsin Dep't of Revenue,
447 U.S. 207 (1980) 14
Goldberg v. Sweet,
488 U.S. 252 (1989) 12, 14
McDonnell Douglas v. Franchise Tax Bd,
31 Cal.Rptr2d. 712 (Cal.App.2 Dist 1994) 10
McDonnell Douglas v. Franchise Tax Bd.,
33 Cal.Rptr.2d 129 (Cal.App.2 Dist. 1994) 10
Mobil Oil Corp. v.
Commissioner of Taxes,
445 U.S. 425 (1980) 14
Moorman Mfg. Co. v. Bair,
437 U.S. 267 (1978) 14, 15, 16
Olympia Brewing Co. v.
Commissioner of Revenue,
326 N.W.2d 642 (Minn. 1982) 10

Pabst Brewing Co. v.
Wisconsin Dep't of Revenue,
387 N.W.2d 121 (Wis. Ct. App.),
review denied, 391 N.W.2d 209
(Wis. 1986) 10
Shell Oil v. Iowa,
488 U.S. 19 (1988) 6
Standard Pressed Steel Co. v.
State of Washington Dep't Revenue,
419 U.S. 560 (1975) 7
Strickland v. Patcraft Mills, Inc.,
302 S.E.2d 544 (Ga. 1983) 10
Trinova Corp. v. Michigan,
498 U.S. 358 (1991) 6
Tyler Pipe Industries, Inc. v.
Washington Department of Revenue,
483 U.S. 232 (1987) 7

CONSTITUTIONAL PROVISIONS AND STATUTES

28 U.S.C. § 1257(a) 1
Utah Admin. R. 865-6-8F(I)(4)(b)
and (c) (1989) 1
Utah Code Ann. §§ 59-7-317
and 318 (1987) 1
Utah Code Ann. §§ 59-7-317
and 318 (1987), ... 4
Utah Code Ann. § 59-7-318 (1987) 8
Utah Code Ann. § 59-13-93 (1967) 4

JURISDICTION

The judgment of the Utah Supreme Court was entered on June 10, 1994. No rehearing was sought. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Utah Code Ann. §§ 59-7-317 and 318 (1987).

Utah Admin. R. 865-6-8F(I)(4)(b) and (c) (1989).

The Respondent, Utah State Tax Commission, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Utah Supreme Court's opinion in this case. That opinion is reported at 877 P.2d 133 (Utah 1994).

STATEMENT OF THE CASE

In accordance with Rules 24.2 and 14.1(g) of the Rules of the Supreme Court of the United States, Respondent sets forth the following key facts that Petitioner misstated or omitted from its statement of the facts.

A. FACTUAL SUPPLEMENT

The following facts contained in the record below are missing from Petitioner's statement of the case:

Lockheed Missiles & Space Co. ("Lockheed"), as prime contractor, subcontracted with Hercules Incorporated ("Hercules") to furnish motors and components for a missile to be manufactured by Lockheed. (R. at 0655, 0659, 0661.)[1] There was no "Hercules-Lockheed multistate enterprise,"[2] as Hercules suggests; Lockheed was the prime contractor, Hercules was a subcontractor.

Hercules' entire manufacturing process was performed in Utah. (R. at 1103, 1150.)

The contract between Lockheed and Hercules did not require that the rocket motors be functional at the time of their delivery. (R. at 1098, 1110, 1162.)

Under the facts of this case and the terms of the contractual provisions, the missile motors and components were delivered to a purchaser, Lockheed, within the State of Utah. (R. at 1103, 1111.)

Point of delivery for Lockheed's final acceptance of the motors and components under the terms of the contract was Hercules' Bacchus, Utah facility. (R. at 0661, 1104.)

Upon final acceptance by Lockheed at Bacchus, Utah, Hercules was entitled to compensation, and payment was triggered under the terms of the contract. (R. at 1078, 1107.) Final acceptance constituted delivery for satisfying delivery schedules. (R. at 0606.)

---

[1] "R." refers to the record before the Utah Supreme Court.

[2] Petitioner's Brief at p. 11.

When the motors were shipped, they were owned by the US government. Hercules acted not as shipper for itself, but as an agent for the US Navy, in shipping the motors and component parts from Bacchus, Utah to the military seaports. (R. at 0663, 1099.)

Hercules' duties in the State of Washington consisted of services in providing technical support in accordance with the terms of the contract between Hercules and Lockheed. (R. at 0669.)

In the States of Washington and California where Lockheed completed the prime contract, Hercules performed no hands-on manufacturing whatsoever on the motors and components. (R. at 1103, 1119, 1123, 1146, 1150, 1151, 1158.)

If any of the components or motors were found defective, such components and motors were returned to the State of Utah for further remanufacture and repair. (R. at 1146.)

B. UTAH'S APPLICATION OF UDITPA

For the period at issue, the State of Utah had in force the Uniform Division of Income for Tax Purposes Act ("UDITPA"). For multistate taxpayers, UDITPA provides the framework for determining how much of the taxpayer's income is subject to Utah tax. A taxpayer's total business income[3] is multiplied by an apportionment fraction to

---

[3] UDITPA recognizes that a portion of a taxpayer's income might not be properly subject to apportionment. UDITPA distinguishes between "business income" which is apportioned, and "nonbusiness income" which

determine the portion that is taxable in Utah.[4] Utah's apportionment fraction is computed by averaging a property factor, a payroll factor and a sales factor, as follows:

$$\frac{\frac{\text{UTAH PROPERTY}}{\text{ALL PROPERTY}} + \frac{\text{UTAH PAYROLL}}{\text{ALL PAYROLL}} + \frac{\text{UTAH SALES}}{\text{ALL SALES}}}{3}$$

The issue in this case focuses solely on whether Utah's sales numerator should include the sales of the motors and components from Hercules to Lockheed. Under the terms of Utah Code Ann. §§ 59-7-317 and 318 (1987), (*see* attached addendum), sales of tangible personal property are included in the Utah numerator of the sales factor "if the property is delivered or shipped to a purchaser, other than the United States Government, within this State . . . ."[5] UDITPA's three-factor formula has been consistently upheld and approved by this Court. "Indeed not only has the three-factor formula met our approval, but it has become . . . a benchmark against which other apportionment formulas are

---

is allocated. It is undisputed that the income from Hercules' sale of motors and components to Lockheed is part of Hercules' business income which is subject to apportionment, but it is not the only element of Hercules' apportionable income.

[4] The following illustrates the operation of the apportionment fraction:

TOTAL BUSINESS INCOME	x	UTAH'S APPORTIONMENT FRACTION	=	PORTION OF BUSINESS INCOME TAXABLE IN UTAH

[5] Formerly codified as Utah Code Ann. § 59-13-93 (1967).

judged." Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 170 (1983) (citations omitted).

Here, Utah is taxing business income apportioned to Utah; it is not taxing the separate factors of payroll, property, and sales. These factors are indicators of economic activity in Utah for purposes of determining how much of Hercules' multi-jurisdictional income is attributable to Utah. Under UDITPA, Utah applies an apportionment formula to all of the business income, not to each separate factor. Likewise, Utah's tax rate is applied to apportioned business income, not to the sales which are assigned to the numerator of the Utah sales factor.

C. DISPUTED FACTS

Respondent disputes Hercules' characterization of UDITPA and the lower court proceedings as follows:

1. UDITPA

Respondent takes exception to Hercules' characterization of UDITPA to support its allegation of "double taxation" in part 2 of its statement of the case. UDITPA apportions not only "interstate income" but all of a taxpayer's business income, wherever earned. Under UDITPA, there is no distinction between intrastate and interstate income.[6] Business income is apportioned among the states under the three-factor formula.

Second, there is no record evidence that Hercules paid tax in Washington and California on 100% of the income

---

[6] *See* footnotes 3 & 4 above.

derived from the sales. The record contains no evidence of either the amount of tax paid in Washington and California or the computations supporting such payments. The inclusion of a portion of the sales of motors and components in the California sales factor numerator would increase California's apportionment fraction, but would certainly not result in 100% taxation of the income from such sales in California.

Hercules misunderstands the operation of UDITPA and mischaracterizes what is being taxed. In this case, the sales themselves are not being taxed. Rather, Utah is including the sales in its sales factor of the apportionment formula. Hercules fatally mischaracterizes such inclusion as the "taxing" of the sales.[7] It is nothing of the sort; UDITPA does not tax the individual components of the formula. Rather, the formula apportions to each state the fraction of the overall business income of the enterprise attributable to that state. This Court has held that the inclusion of an item in the income base is not tantamount to direct taxation. Shell Oil v. Iowa, 488 U.S. 19, 31 (1988). Similarly, it is fundamentally inaccurate to assert, as does Hercules, that Utah is taxing each component of net income separately. Trinova Corp. v. Michigan, 498 U.S. 358, 375 (1991); Amerada Hess v. New Jersey, 490 U.S. 66, 74 (1989).

---

[7] Hercules repeatedly contends that it has been taxed on "100% of the income from those sales" (Petitioner's Brief at 4, 5) or that the "rocket motor sales were taxed twice" (Petitioner's Brief at 14). This underscores Hercules' profound misunderstanding as to the nature of UDITPA; inclusion in a factor is an indicator of economic activity in a state--it is not proof of direct taxation.

Finally, Hercules' assertion that Washington utilizes UDITPA to apportion income from sales of tangible personal property is erroneous. The State of Washington imposes a business and occupation tax, a form of gross receipts tax. It is a tax different in character from Utah's corporate franchise tax (a tax based on net income), and is not an income tax based on apportionment of income under UDITPA.[8] During the audit period, the State of Washington did not apportion any income on the basis of a three-factor formula. Washington has adopted the Multistate Tax Compact, but does not apply the multistate compact to sales involving tangible personal property under its business and occupation tax.

2. LOWER COURT PROCEEDINGS

Respondent disputes Hercules' description of the lower court proceedings and its analysis of the Utah Supreme Court's opinion. Respondent believes that the decisions below speak for themselves, but in the interest of clarity will briefly retrace them.

---

[8] This Court has discussed the precise nature of the Washington business and occupation tax in two cases arising in that state. In Standard Pressed Steel Co. v. State of Washington Dep't Revenue, 419 U.S. 560 (1975), this Court noted that the business and occupation tax was "levied on the unapportioned gross receipts of appellant [Standard Pressed Steel Co.] resulting from its sale of fasteners to Boeing." Id. at 562 (emphasis added). In Tyler Pipe Industries, Inc. v. Washington Department of Revenue, 483 U.S. 232 (1987), this Court did not reach the claim that the tax system under review did not fairly apportion tax liabilities between Washington and other states, but did note that Tyler Pipe's "apportionment rests on the erroneous assumption that through the B & O tax, Washington is taxing the unitary activity of manufacturing and wholesaling." Id. at 251. This is in contrast with this case, where the issue is apportionment of the income of a unitary business.

The Utah State Tax Commission found that final delivery of the motors and components was made in Utah and, therefore, the sales were Utah sales includable in the numerator of the sales factor of the three-factor formula. The Tax Commission decision was based on the fact that Lockheed was a purchaser within the State and delivery took place in Utah, thus falling within Utah Code Ann. § 59-7-318 (1987) (UDITPA).

The district court reversed, holding that because the missiles were not completed until final delivery in the State of Washington, Utah's inclusion of the sale of motors and components in its sales factor was in violation of the Commerce Clause.

The Utah Court of Appeals reversed the district court, ruling that under the facts of the case, the sales contract between Hercules and Lockheed was for motors, not completed missiles. The motor sales were consummated in the State of Utah because final acceptance and delivery of the motors and components occurred at Hercules' Bacchus, Utah facility. The court further noted that these were Utah sales, because the sales were completed in Utah, and that these particular transactions between Hercules and Lockheed did not spill over into the States of Washington and California.

Hercules appealed to the Utah Supreme Court; it affirmed the decisions of the Court of Appeals and the Utah State Tax Commission. The court held that the Utah sales at issue were properly includable in the Utah numerator of the sales factor, as final acceptance and delivery to a purchaser within the State had occurred within Utah's borders.

Hercules misconstrues the Utah Supreme Court's language that the sales are not interstate into a broad attack on "cooperative federalism."[9] Hercules has confused the concepts of interstate sales and interstate commerce. Read in context, the court's opinion simply states that the particular transactions at issue were completed within Utah; it notes that Hercules' involvement in the manufacturing of the motors ended in Utah. This observation is not the equivalent of holding that the sales did not involve interstate commerce, as Hercules seeks to paint the decision. The court's holding that these particular transactions or sales were not extra-territorial to the State of Utah, but were fully consummated in the State of Utah, is fully supported by the record. Under the framework supplied by UDITPA, the Utah Supreme Court's conclusion that delivery had been made to a purchaser within the State justified including these sales in the Utah sales numerator.[10] The court acknowledged that the transaction between Hercules and Lockheed had occurred fully within the State of Utah and generated economic value in that State, which justified including such sales in the Utah sales numerator.

REASONS FOR DENYING THE WRIT

Hercules has not established grounds to merit review consistent with Rule 10 of this Court's rules. The decision

---

[9] Petitioner's Brief at p. 7.

[10] The Utah Supreme Court stated flatly that even under a destination or market rationale, Utah was the destination or market state where the sale contemplated by the contract occurred.

of the Utah Supreme Court is not in conflict with a decision of a court of last resort in another state or of a United States court of appeals. To review Hercules' appeal on the merits would require this Court to consider issues well-settled by its prior jurisprudence. The decision of the Utah Supreme Court squares with the precedents articulated by this Court regarding taxation of multistate corporations and with decisions in this area by other state supreme courts.[11]

It would not be a beneficial use of this Court's time to revisit the factual squabble between the parties to the proceedings below. In its decision, the Utah Supreme Court construed Utah's version of UDITPA, and the result was well "within the realm of permissible judgment."[12]

No federal question or constitutional impasse has occurred which demands the intervention of this Court. The question before this Court is whether Utah's construction of its statute, which is based on a uniform act, presents a question requiring review by this Court. As this Court has

---

[11] Under the "destination rule," the location of the purchaser determines the destination of the goods. Pabst Brewing Co. v. Wisconsin Dep't of Revenue, 387 N.W.2d 121, 123 (Wis. Ct. App.), *review denied*, 391 N.W.2d 209 (Wis. 1986); Department of Revenue v. Parker Banana Co., 391 So. 2d 762, 762-63 (Fla. Dist. Ct. App. 1980); Strickland v. Patcraft Mills, Inc., 302 S.E.2d 544, 544 (Ga. 1983); Olympia Brewing Co. v. Commissioner of Revenue, 326 N.W.2d 642, 644 (Minn. 1982), *contra* McDonnell Douglas v. Franchise Tax Bd, 31 Cal.Rptr2d. 712 (Cal.App.2 Dist 1994) *modified on reh.*, McDonnell Douglas v. Franchise Tax Bd., 33 Cal.Rptr.2d 129 (Cal.App.2 Dist. 1994), cert pending. Because Lockheed is a Utah company that took delivery, accepted and obtained title to the rocket motors all in Utah, Utah may properly include the sales under the "destination rule."

[12] Container Corp., 463 U.S. at 180.

already determined that UDITPA passes constitutional muster, it appears no substantial federal question exists that merits the attention of the Court.

A. HERCULES HAS NOT MET ITS BURDEN TO ESTABLISH A COMMERCE CLAUSE VIOLATION

Utah's treatment of the sales of motors and component parts fully consummated in the State of Utah, is entirely consistent with the test articulated in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).[13] Hercules concedes that the first and fourth prongs of the Complete Auto test are met; the second and third prongs are discussed below.

1. FAIR APPORTIONMENT

Regarding the second prong of Complete Auto, Hercules' naked assertion that the tax is not fairly apportioned is incorrect. To be fairly apportioned, a tax must be both internally and externally consistent. Container Corp., 463 U.S. at 169. Utah's UDITPA-based apportionment method meets both of these tests.

First, the Utah tax is internally consistent. "To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation

---

[13] A tax should be sustained against Commerce Clause challenge if:
(1) the tax is applied to an activity with a substantial nexus with the taxing state,
(2) is fairly apportioned,
(3) does not discriminate against interstate commerce, and
(4) is fairly related to the services provided by the State.
Complete Auto, 430 U.S. at 279.

would result." Goldberg v. Sweet, 488 U.S. 252, 261 (1989). If each state included sales of goods that were manufactured, sold, and delivered to an in-state purchaser in its sales numerator, no multiple taxation would occur. Under UDITPA, the factual predicate of delivery can occur in only one state. The product of a transaction will only be delivered once to the purchaser.

Second, the Utah tax is externally consistent. In approving UDITPA's three-factor formula, this Court stated that "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." Container Corp., 463 U.S. at 169. The UDITPA three-factor apportionment formula has consistently been upheld by this Court and has become a "benchmark against which other apportionment formulas are judged." Id. at 170. Applying UDITPA, Utah's apportionment fraction reasonably reflects the fact that Hercules, through the use of property, the expenditure of payroll, and the resulting sales, generates income in Utah.

Furthermore, Hercules has failed to demonstrate that Utah's apportionment is inappropriate. This Court has stated that it will strike down the application of an apportionment formula only "if the taxpayer can prove by 'clear and cogent evidence' that the income attributed to the State is in fact out of all appropriate proportions to the business transacted in that State." Container Corp., 463 U.S. at 170 (citations omitted) (emphasis added). This Court continued, stating:

> [A]ppellant has the burden of proof; it must demonstrate that there is no rational relationship between the income attributed to the State and the intrastate values of the

> enterprise by proving that the income apportioned . . . is out of all appropriate proportion to the business transacted by the appellant in that state.

Id. at 180-81 (citations omitted) (emphasis added). Under the clear and cogent evidence standard, Hercules is required to demonstrate that the income attributed to Utah, calculated using UDITPA's three factors, is grossly disproportionate to the business activities conducted by Hercules within the state.

Hercules has failed to satisfy this burden. It is undisputed that the property and payroll factors were properly attributed to Utah. Presumably, to the extent Hercules had payroll and property in California, they were reflected in the payroll and property factors in that state.[14] UDITPA does not, as Hercules suggests, arbitrarily assign factors among the various states in order to achieve some theoretical balance. Rather, it apportions income given the facts and circumstances as a whole.

Under Utah's UDITPA provisions, these sales are appropriately included in the sales numerator by the State of Utah. In this case, the delivery of the rocket motors was found by the Utah Tax Commission, the Utah Court of Appeals, and the Utah Supreme Court to have occurred at Bacchus, Utah. Hercules has not shown that this finding is clearly erroneous. Hercules has also failed to demonstrate that the income attributed to Utah did not have a substantial relationship to the State of Utah.

---

[14] As noted previously, Washington does not employ UDITPA to apportion income based on these factors. *See* footnote 8 above.

2. FAILURE TO SHOW DISCRIMINATION

The third prong the Complete Auto test is met as the Utah tax does not discriminate against interstate commerce and is consistent with this Court's interstate commerce cases and with UDITPA.[15] No discrimination, facial or as applied, has been proven in this case. Here, discrimination is claimed solely on the basis of alleged duplicative taxation. Simply put, there is insufficient evidence for this proposition.

In fact, the record contains no evidence whatsoever as to the income tax implications in this case. No computations or figures were introduced to show the amount of income attributed to California or the amount of tax actually paid in California. No computations or figures were introduced to show the impact on California's apportionment fraction if sales of motors and components were included in California's sales numerator. There is a similar lack of proof with regard to Washington business and occupation tax, which is not even a tax based on apportionment of income. Consequently, the record does not support a contention that more than 100% of Hercules' income was being subjected to state taxation, or suggest that the amount of Hercules' income being taxed in Utah was not fairly representative of Hercules' business activities in Utah. Hercules bases its whole case on its bald assertion that because the sales at issue were included in the factors of more than one state,

---

[15] Goldberg, 488 U.S. at 265-66; Container Corp., 463 U.S. at 170-171, 180-85; Exxon Corp. v. Wisconsin Dep't of Revenue, 447 U.S. 207, 228-30 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 443-46 (1980); and Moorman Mfg. Co. v. Bair, 437 U.S. 267, 277-80 (1978).

duplicative taxation exists. No evidence exists in the record to support such a claim.

In Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), this Court refused to find double taxation in a taxpayer challenge of apportionment based upon a single sales factor, noting, "[s]ince there is no evidence in the record regarding the percentages of total net income taxed in the other States in which it did business during those years, any claim that appellant was taxed on more than 100% of its total net income would also be speculative." Id. at 276-77 n.11. Similarly, Hercules presented no evidence regarding the net income attributed to California or the resulting income tax paid.[16] Hercules has not demonstrated that it was taxed on more than 100% of its total net income. It has simply asserted double inclusion of the same sales in one of the three apportionment factors. The inclusion by more than one state of sales in the sales factor is not the equivalent of multiple taxation.

An overlap in including sales in the sales factor numerator of two taxing states is not proof of multiple taxation. Moorman specifically rejects the rationale espoused by Hercules in refusing to construe the Commerce Clause as prohibiting "any overlap in the computation of taxable income by the States." Id. at 278.

It should be noted that Hercules has not indicated the cause for attributing the sales at issue to California and Washington. There is no suggestion that the conflict over the sales did not occur as a result of Hercules' own voluntary

---

[16] Washington's business and occupation tax applies to gross receipts, not net gross income.

self-assessments. Thus, nothing in the record suggests that Hercules was audited in the States of Washington or California, nor that taxing entities in those states made any changes whatsoever to Hercules' self assessment as reflected in its returns. No adjudicative decisions from those states are in the record to establish that the assignment of sales was even disputed in those states. Contrary to Hercules' assertion that Respondent stipulated to the fact of double taxation, the Auditing Division merely stipulated that Hercules' tax manager would testify that the sales at issue had been included in California's sales factor and that it had paid Washington business and occupation tax on the sale of the motors.[17]

Hercules' self-assignment to the other states of the sales Utah disputed in its audit does not make Hercules' case. First, Hercules made no showing that the other states would have required such an assignment of the sales if aware of the facts in the case. Second, there was no showing of what happened with respect to the payroll and property factors in California. Third, no showing was made of the overall income picture, i.e. other sources of income and activities in the relevant states. Fourth, even if overlap exists, it is constitutionally permissible. UDITPA simply requires approximation.

It is not the judicial role of this Court to act as the uniformity police to assure that states administer apportionment factors uniformly. Moorman, 437 U.S. at 279. The taxpayer has simply not met its burden of

---

[17] R. at 0656.

demonstrating that the Utah imposed tax was in any way unfair or disproportionate to the company's activity in Utah.

B. THE FACTUAL RECORD UPON WHICH THE UTAH SUPREME COURT MADE ITS STATE LAW DETERMINATION DOES NOT SUPPORT HERCULES' CONSTITUTIONAL CLAIM

The central issue before the Utah Supreme Court was and still remains: Were these sales properly includable under Utah law in the Utah sales numerator based on the facts of the case? The decision of the Utah Supreme Court was based upon a careful examination of the factual record before it, including witnesses, exhibits, and demonstrative evidence. The court correctly applied the applicable UDITPA provisions governing the apportionment of income.

The Petitioner urges that UDITPA be examined as a theoretical construct and that this case be considered in a vacuum. For "[f]acts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the state of facts and evidence."[18]

In Hercules' entire brief, little mention is made of the fact that Utah is the site for delivery, final acceptance, and passage of title from Hercules to Lockheed and for passage of title from Lockheed to the US government. Such acceptance constituted delivery for satisfying the delivery schedules and provided substantiation for billing purposes. Hercules' involvement in the hands-on manufacturing process

---

[18] John Adams (1735-1826), Lawyer and Second President of the United States.

was completed entirely in the State of Utah, and Hercules never again touched these motors and components as they were fashioned by Lockheed into the missiles sold to the US Navy.

In examining the facts of this case, as the Utah Supreme Court did to make its state law determination, the true relationship between Hercules and Lockheed cannot be overemphasized. Hercules was one of a number of subcontractors; Lockheed was the prime contractor. Hercules was responsible to deliver motors and components to Lockheed; Lockheed was responsible for the delivery of completed missiles to the US government. Hercules was in privity of contract with Lockheed; Lockheed enjoyed privity of contract with the US government. Final acceptance of the motors and components, which are at issue in this case, took place at Bacchus, Utah when Lockheed took delivery from Hercules; final acceptance of the completed missile system took place in the State of Washington in fulfillment of the Lockheed-US Government contract. Hercules provided no further hands-on involvement once the motors and components left the State of Utah, but merely provided technical assistance in accordance with the terms of the contract; Lockheed had hands-on manufacturing obligations in assembling the missiles in the seaport states. If any of the motors or components were defective, they were returned to the State of Utah.

C. THE PUBLIC POLICY AGAINST TAX FORUM SHOPPING SUPPORTS RESPONDENT'S POSITION

Hercules overstates the relevance of the proffered testimony of its tax manager regarding treatment of the sales

in California and Washington, arguing that Utah should now be barred from including these sales in its sales numerator. If such logic were to be adopted, multi-state taxation would be reduced to forum shopping for a state with lower marginal tax rates and generous exemptions. The taxpayer would then rush to pay the tax in such a taxing jurisdiction. The absurdity of such a position is readily evident - - - facts, not desires, must control the apportionment process.

CONCLUSION

Hercules failed to meet its burden of proof to establish duplicative taxation violative of the Commerce Clause. The factual findings in this case clearly support Utah's inclusion of the sales of the motors and components in the Utah sales numerator, and reflect a fair apportionment of Hercules' business income for the tax years in question. Thus, the petition for certiorari should be denied.

Respectfully submitted,

Brian L. Tarbet*
Assistant Attorney General
*Counsel of Record
Jan Graham
Utah Attorney General
50 South Main Street, Suite 900
Salt Lake City, UT 84144
(801) 536-8200

ADDENDUM

Utah Code Ann. § 59-7-317 (1987)

Sales factor for apportionment of business income.

> The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

Utah Code Ann. § 59-7-318 (1987)

Sales of tangible personal property.

(1) Sales of tangible personal property are in this state if:

> (a) the property is delivered or shipped to a purchaser, other than the United States Government, within this state, regardless of the f.o.b. point or other conditions of the sales; or
>
> (b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state, and:
>
> (i) the purchaser is the United States Government; or
>
> (ii) the taxpayer is not taxable in the state of the purchaser.

(2) Sales of tangible personal property are not in this state if the seller and the purchaser would be members of the same unitary business group but for the fact that either the seller or the purchaser is a foreign operating company, and the property is purchased for retail outside the United States.

Utah Admin. R. 865-6-8F(I)(4)(b) and (c)

(b) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

(c) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.